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No. 490

In the Supreme Court of the United States

OCTOBER TERM, 1935

BUS AND TRANSPORT SECURITIES CORPORATION,
PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

	Page.
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	3
Statement	4
Argument	6
Conclusion	8

CITATIONS

Cases:

Cortland Specialty Co. v. *Commissioner*, 60 F. (2d) 937	6
Gregory v. *Helvering*, 293 U. S. 465	7
Minnesota Tea Co. v. *Commissioner*, 76 F. (2d) 797	6
Pinellas Ice Co. v. *Commissioner*, 287 U. S. 462	6

Statute:

Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 112	3

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OPINION BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 7) is not officially reported. The opinion of the Circuit Court of Appeals (R. 15) is not officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 3, 1935 (R. 18–19). The peti-

tion for certiorari was filed on October 3, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Corporation A wished to acquire all the stock in two bus lines, and the following plan was devised for that purpose. The individual who owned all the stock created corporation X, the taxpayer, and transferred to it all of the stock of the two bus lines in exchange for all the stock of X. On the other hand corporation A was affiliated with corporation B, which created corporation C and transferred to it certain stock of corporation A in exchange for all the stock of C. Thereupon corporation X, the taxpayer, transferred the stock in the bus lines to corporation B in exchange for all the stock of corporation C. It does not appear that corporation X, the taxpayer, and corporation C performed any other function or served any business purpose after the transfer was effected. The question presented is:

Whether corporation X, the taxpayer, is relieved from taxation on the gain realized from the transaction within the meaning of Section 112 (b) (4) and (i) of the Revenue Act of 1928. This depends upon (1) whether the taxpayer corporation X retained some interest in the two bus lines which were transferred to corporation B, and (2) whether the taxpayer, corporation X, and corporation C

were created for useful business purposes or were mere devices to bring the case under the reorganization provisions of the Revenue Act under the rule laid down by this Court in *Gregory* v. *Helvering,* 293 U. S. 465.

STATUTE INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791, 816:

> SEC. 112. RECOGNITION OF GAIN OR LOSS.
>
> (a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.
>
> (b) *Exchanges solely in kind.*—
>
> * * * * *
>
> (4) * * * No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.
>
> * * * * *
>
> (i) *Definition of reorganiation.*—As used in this section and sections 113 and 115—
>
> (1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by

a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

* * * * *

STATEMENT

The facts as found by the Board of Tax Appeals, which consisted of allegations in the petition admitted by the respondent's answer, may be summarized as follows (R. 7–9):

The Public Service Corporation of New Jersey (hereafter called Public Service Company), desired to acquire two bus lines, the Butler-Newark Bus Line, Inc. (hereafter called BN Company) and the Boonton-Mt. Lakes-Newark Bus Lines, Inc. (hereafter called BM Company). One C. Easman Jacobus was the owner of practically all the stock of the two lines, which he had acquired for $28,500. The transfer was accomplished in the following manner, pursuant to plan:

The Public Service Coordinated Transport (hereafter called Coordinated Company) organized the C. Easman Jacobus, Inc. corporation (hereafter called Jacobus Company), and transferred to it in exchange for all of its capital stock 2,500 shares of 6% Cumulative Preferred Stock of the Public Service Company.

C. Easman Jacobus personally organized the Bus and Transport Securities Corporation, the taxpayer, and caused it to issue to him and his nominees all of its capital stock in exchange for all of the capital stock of the BN and BM Companies.

Thereupon, on March 29, 1929, the Coordinated Company transferred to the taxpayer all the capital stock of the Jacobus Company and the taxpayer transferred to the Coordinated Company all the stock of BM and BN Companies. At the time of the transfer, the fair market value of the stock of the Jacobus Company was $274,062.50 (R. 7–9).

The taxpayer filed its return for the year 1929 and reported no gain or loss on the above-mentioned transaction. The Commissioner audited the return and determined that the taxpayer had realized a gain of $245,562.50, as a result of which there was a deficiency of $27,011.88. The taxpayer appealed to the Board of Tax Appeals on the ground that the transaction fell within the provisions of Section 112 (b) (4) and (i) under which no gain or loss was recognized. The Board of Tax Appeals decided in favor of the Commissioner on

the ground that there was no reorganization within the meaning of the statute. The taxpayer appealed to the Circuit Court of Appeals which affirmed the decision of the Board of Tax Appeals.

ARGUMENT

The first reason which the taxpayer assigns for granting the writ is that the decision in this case is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Minnesota Tea Co.* v. *Commissioner,* 76 F. (2d) 797. This Court granted certiorari in that case, No. 174, October Term, 1935, on October 14, 1935.

In the instant case, however, there was no such continuity of interest in the property transferred as there was in the *Minnesota Tea Co.* case. In the latter case the Minnesota Tea Company transferred certain assets to the Grand Union Company in exchange for cash and Grand Union stock, and the Minnesota Tea Company continued to hold the Grand Union stock. In the instant case, however, the taxpayer retained no interest in the property transferred, the stock of the two bus lines, BN Company and BM Company. After the transfer the taxpayer held all the stock of the Jacobus Company, which had no proprietary interest in the bus lines, BN Company and BM Company. Therefore, the instant case does not come within the reorganization provision of the revenue act. *Pinellas Ice Co.* v. *Commissioner,* 287 U. S. 462; *Cortland Spe-*

cialty Co. v. *Commissioner,* 60 F. (2d) 937 (C. C. A. 2d).

The taxpayer argues that there was such a continuity of interest as the statute requires because the assets of Jacobus Company consisted of 2,500 shares of preferred stock of the Public Service Company, and the Public Service Company was affiliated with the Coordinated Company, which in turn was the owner of all the stock of the BN Company and the BM Company. We submit that this relationship between the taxpayer and the BN and BM companies, after the transfer, was far too remote to come within the rule laid down by the *Pinellas* case and the *Cortland Specialty Co.* case.

Moreover, the entire transaction, including the creation of the petitioner and the Jacobus Company, was a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character. There was no purpose to reorganize a business, but merely to transfer some stock. Therefore the case comes within the rule laid down by this Court in *Gregory* v. *Helvering,* 293 U. S. 465. In that case this Court said (p. 470):

> The whole undertaking, though conducted according to the terms of subdivision (B), was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else. * * * To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose.

CONCLUSION

The instant case is not in conflict with the decision in the *Minnesota Tea Co.* case because there is a material difference in the facts of the two cases. This case is controlled by prior decisions of this Court, and does not present any new question of general importance. Therefore, the petition for certiorari should be denied.

Respectfully submitted.

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